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Supreme Court, U.S.
FILED
FEB 14 2003

No. 02-585

In The
Supreme Court of the United States

PEABODY COAL COMPANY,

Petitioner,

v.

ROBERT D. GRAY
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

The Peabody Coal Company respectfully submits this supplemental brief to request that the Court hold the petition for a writ of certiorari filed in this case in abeyance pending this Court's decision on the merits in *Black & Decker Disability Plan v. Nord*, No. 02-469 (*"Nord"*). The decision in *Nord* is highly likely to be dispositive of the matters presented here. The relief requested is warranted and appropriate for the reasons that follow:

1. In this case, the Sixth Circuit reversed a denial of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, because the administrative law judge ("ALJ") failed to follow that court's rule "that opinions of treating physicians are entitled to greater weight than those of non-treating physicians." App. 5. The court of appeals remanded the case for application of this rule.

2. The decision instructs the agency on remand that "the medical opinions of treating physicians must be accorded additional weight where the ALJ finds them to be well reasoned and credible on the merits" and that "[i]t was error . . . not to give additional weight to the opinion of Dr. Simpao based upon his status as treating physician." *Id.* at 5-6.

3. In first adjudicating the case, the ALJ found the treating doctor's opinion was reasoned and documented, but also that it was not the best or strongest opinion and did not overcome the contrary views of more expert physicians. *Id.* at 29, 32. On remand, the ALJ will have no choice but to accept the treating doctor's opinion based upon status alone and award benefits.

4. On January 10, 2003, this Court granted a writ of certiorari in *Nord*. The question presented in *Nord* is: "Whether the Ninth Circuit erred in holding that an ERISA disability plan administrator's determination of disability is subject to the 'treating physician rule' and, therefore, the plan administrator is required to accept the treating physician's opinion of disability as controlling unless the plan administrator rebuts that opinion in writing based upon substantial evidence on the record." Peabody's petition challenges the Sixth Circuit's application of a treating physician rule in federal black lung benefits claims.

5. Both the ERISA rule and the black lung rule require the fact finder to give preferential treatment, if not controlling weight, to a benefit applicant's treating doctor solely because of the physician's status. Both rules originate in SSA disability benefit claims arising in several circuits that accorded extra weight to a treating doctor in determining a claimant's entitlement or degree of disability. *Compare Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1138-39, 1143-44 (9th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3001 (U.S. June 13, 2002) (No. 01-1840) ("We see no reason why the [SSA] treating physician rule should not be used under ERISA") *with Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993) (citing SSA claims determinations as authority for holding "it is clearly established that opinions of treating physicians are entitled to greater weight. . . . "). Moreover, on January 22, 2003, the Sixth Circuit joined the Ninth Circuit in mandating a treating physician rule for ERISA disability claims, citing its decision in *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3474 (Jan. 13, 2003) (U.S. No. 02-249), *petition for reh'g pending*, as the only

Sixth Circuit authority for doing so. *Darland v. Fortis Benefits Insurance Co.*, F.3d, 2003 WL 141620 at *15 (6th Cir. Jan. 22, 2003).

6. Neither the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, nor the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, authorizes a treating doctor rule. In both ERISA and black lung claims, the courts that accept a treating doctor preference rely on a judicially created and unsubstantiated assumption that by having a treating relationship with a patient, a treating doctor acquires significant knowledge not knowable by other experts. *See Darland*, 2003 WL 141620 at *16, *quoting Regula*, 266 F.3d 1130.

7. Although the black lung cases[1] raise additional issues arising under the Administrative Procedure Act, 5 U.S.C. §§ 551-59 ("APA"), and challenge the Department of Labor's adoption of a new treating doctor regulation, there is no meaningful difference between the ERISA rule the Court has elected to review and the black lung rule. The DOL regulation is not supported by science, but is premised on the SSA rule. *See* 65 Fed. Reg. 79931-34 (Dec. 20, 2002). The regulation, therefore, like the Sixth and Ninth Circuit ERISA rules, rests solely on the authority and intellectual force of the SSA rule. The APA issue arises because the treating doctor rule artificially exaggerates

[1] Three black lung cases challenging the Sixth Circuit's application of a treating doctor rule have been petitioned to this Court including this case, *Peabody Coal Co. v. Groves*, No. 02-249 and *Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3401 (U.S. Nov. 27, 2002) (No. 02-834). A similar request is being made in *Jericol Mining*.

the significance of certain evidence in a manner that has been disapproved by this Court in APA adjudications. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). Whether or not the APA applies, however, the black lung rule shares much common legal ground with the ERISA rule and is predicated upon an identical rationale.

8. In opposition to Peabody's petition, the U.S. Department of Labor again presses the untenable theory that the circuits agree that a treating doctor rule is appropriate for black lung claims and that the "unpublished" status and lack of finality of the Sixth Circuit's opinion here makes review inappropriate under any circumstances. It is hard to dispute the circuit disagreement following the Fourth Circuit's decision in *Consolidation Coal Co. v. Held*, 314 F.3d 184 (4th Cir. 2002). In *Held*, the majority expressly refuses to accord weight for status to a treating doctor, while the dissent argues for application of the Sixth Circuit's approach in *Jericol Mining*. 314 F.2d at 187-188, 189. The fact that the Sixth Circuit's decision here is unpublished is of no significance inasmuch as the rule reflected in the Sixth Circuit's opinion requires that additional weight be accorded treating doctors on account of their status for no reason or an invalid one. *Gray* is no different in this respect than *Groves* or *Jericol*. In all these cases, the court demands unwarranted credit for a treating doctor's status. It makes no difference how the court articulates its clear intention to apply a treating doctor rule or whether the court designates the opinion for publication. Neither is the fact that the case was remanded a reason to deny review. There is no doubt what must happen when the case is returned to the agency, and the controlling legal question brought to the Court is finally resolved by the Sixth Circuit's opinion.

9. Finally there is considerable urgency in having the black lung treating doctor issue resolved expeditiously. Although acceptance of a treating doctor rule predicts substantial future disruptions for employee benefit plans, significant disruptions already have occurred for coal mine operators and their insurers as a result of the black lung treating doctor rule. Basic insurance rates for smaller mine operators have increased by at least 200% in significant part in anticipation of a widespread treating doctor rule. *See Groves*, Petition for Certiorari at 28 nn. 20-21. Unrefuted actuarial studies predict substantial increases in benefits and medical costs for employers and insurers as well. *Id.* The treating doctor preference touches on all medical eligibility criteria in black lung claims and is, therefore, the principal cost driver for these increases. *Id.*, nn. 19, 20.

10. Peabody should not be required to pay black lung benefits solely as a result of a rule that is invalid for ERISA cases, should that be the result in *Nord*. Nor should Peabody have its rights extinguished prematurely in this case.

It is, therefore, respectfully requested that this Court delay consideration of Peabody's petition for a writ of certiorari until a decision is issued in *Nord*.

Respectfully submitted,

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